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No. 92-1860

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD WAYNE DOUGLAS AND
DOUGLAS DRILLING, INC., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the right of a secured lender to pursue a nonjudicial foreclosure under Texas law is a substantive right that, under the Rules Enabling Act, 28 U.S.C. 2072(b), cannot be abridged by the Federal Rules of Civil Procedure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is reported at 979 F.2d 1128. The opinion of the district court (Pet. App. 14a-17a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1992. A petition for rehearing was denied on February 3, 1993. Pet. App. 1a-2a. The

[1] The opinions reproduced in the appendix to the petition contain several omissions. We have reproduced corrected versions of the relevant passages (with the portions omitted from the appendix to the petition italicized) in the Addendum to this brief. See Addendum, *infra*, 1a.

petition for a writ of certiorari was filed on May 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 2, 1987, petitioners executed two promissory notes in favor of First RepublicBank Abilene, N.A. (FRBA). Petitioner Douglas Drilling, Inc. (DDI) secured its note by granting a security interest in personal property; petitioner Donald Wayne Douglas (Douglas) secured his note by granting a deed of trust in a mineral lease and a security interest in 1,000 shares of DDI stock. A few months later, in January 1988, petitioners defaulted on the two notes. See Pet. App. 7a.

On April 11, 1988, after the maturity date of the notes, petitioners filed a class action against FRBA in Texas state court, alleging that FRBA had calculated and charged interest in fraudulent amounts. After the case was removed to federal court, FRBA filed an answer, but did not assert counterclaims against petitioners to collect on the notes. In July 1988, the Federal Deposit Insurance Corporation was appointed receiver for FRBA. As receiver, it sold the assets of FRBA (including petitioners' notes) to NCNB Texas National Bank, now known as NationsBank of Texas, N.A. (NCNB). The class action against FRBA was continued against the Federal Deposit Insurance Corporation as receiver for FRBA. NCNB did not become a party to the class action. In March 1990, on petitioners' motion, the class action was dismissed with prejudice. See Pet. App. 8a.

2. On March 25, 1991, petitioners filed this action in Texas state court, seeking a declaratory judgment

that they were not liable on the notes. NCNB counterclaimed for recovery of the collateral. In November 1991, NCNB assigned the two notes to the Federal Deposit Insurance Corporation in its corporate capacity (FDIC), the current holder of the notes.[2] On December 13, 1991, the FDIC intervened in this action. The FDIC then removed the case to federal district court, where it sought recovery of the amounts due on the notes and an order requiring DDI to turn over the collateral. See Pet. 2-3; Pet. App. 7a-8a, 16a.

On May 21, 1992, the district court granted summary judgment in favor of the FDIC. Pet. App. 14a-17a. The court rejected petitioners' argument that NCNB and the FDIC were barred from collecting on the notes because FRBA had failed to attempt to collect on the notes as a compulsory counterclaim in the earlier class action. The court noted that under Texas law, a borrower cannot force a lender to waive its nonjudicial foreclosure remedy by filing a lawsuit arguing that the debt is uncollectable. The court reasoned that the compulsory counterclaim rule therefore did not require FRBA to elect judicial foreclosure in the earlier litigation. *Id.* at 15a-16a.

3. The court of appeals affirmed. Pet. App. 5a-11a. The court explained that once a state court action is removed to federal court, it is governed by federal procedural rules, including Fed. R. Civ. P. 13(a) (which governs compulsory counterclaims). Nevertheless, the court explained, a federal procedural rule that would "abridge, enlarge or modify any sub-

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[2] The FDIC has advised us that the court of appeals erred in stating (Pet. App. 8a) that the notes were assigned to the FDIC in November 1990.

stantive right" would violate the Rules Enabling Act, 28 U.S.C. 2072(b), and thus could not be applied in such a case. Pet. App. 9a (citing *Hanna* v. *Plumer*, 380 U.S. 460, 470-473 (1965)). The court concluded that application of the compulsory counterclaim rule in this case would abridge the lender's substantive right under Texas law to elect the nonjudicial foreclosure remedy. It also would enlarge the debtors' substantive rights by allowing them to force the lender to pursue judicial foreclosure, a power not available to the debtors under Texas law. Pet. App. 10a. Accordingly, the court concluded that FRBA had not been required to assert counterclaims on the overdue notes in the class action and that the FDIC's present counterclaims for collection were not barred. *Id.* at 11a.

ARGUMENT

Petitioners contend (Pet. 5-20) that the court of appeals erred in concluding that Fed. R. Civ. P. 13(a) does not bar the FDIC's attempt to collect on petitioners' notes in this action. That contention does not merit review.

The Rules Enabling Act, 28 U.S.C. 2072, sets the limits within which Congress intended the rules of practice and procedure in federal courts to operate. See, *e.g.*, *Burlington Northern Railroad Co.* v. *Woods*, 480 U.S. 1, 5 (1987) (Congress's rulemaking authority originates in the Constitution and is bestowed on the Court by the Rules Enabling Act); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 748 (1980) (even if a federal rule clearly is applicable, the rule applies only if it is within the scope of the Rules Enabling Act). One of those limits is the mandate that the rules of procedure "shall not abridge, enlarge

or modify any substantive right." 28 U.S.C. 2072(b); see *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 27 n.5 (1988) (federal rules must be measured against statutory requirement of Rules Enabling Act that they not "abridge, enlarge or modify any substantive right").

To use this Court's phrasing, application of a particular federal rule in a particular case passes muster under the Rules Enabling Act if the "rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14 (1941); see *Hanna* v. *Plumer*, 380 U.S. 460, 464 (1965) (same). The decision of the court of appeals in this case is nothing more than an application of that test to a particular factual situation. Given the determination of the lower courts that Texas law granted respondent the capacity to control the means by which it would collect on its debt—and thus would not have required respondent to assert a claim to collect on that debt as a compulsory counterclaim in state court—it was entirely reasonable for those courts to conclude that application of Fed. R. Civ. P. 13(a) to deprive respondent of that capacity would transgress the bounds of the Rules Enabling Act. Notwithstanding petitioners' high-blown rhetoric, nothing in that analysis limits the "uniform system of practice and procedure" in the federal courts. Pet. 7. The court of appeals simply concluded that application of Rule 13(a) in this case would go beyond matters of procedure into matters of substance, which the Federal Rules do not govern.

Petitioners err in asserting (Pet. 7-17) that the decision of the court of appeals conflicts with numerous decisions of this Court and other courts of appeals. None of the decisions on which petitioners rely considers whether Fed. R. Civ. P. 13(a) properly can abridge rights like the right to foreclose at issue in this case. The three appellate decisions that consider the applicability of Rule 13 in federal court involved situations in which a state rule absolutely barred a party from presenting a counterclaim in a particular proceeding and thus required related claims to be pursued separately. The question was whether the federal court nevertheless should permit joinder of such a counterclaim.[3] Accordingly, none of those courts had any occasion to address the logically distinct problem at issue here—whether a party's capacity under state law to withhold a claim and pursue instead a *nonjudicial* remedy is a substantive right not to be infringed by a federal rule requiring presentation of certain counterclaims in a pending proceeding.

Finally, petitioners argue (Pet. 18-20) that the lower courts erred in interpreting Texas law.

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[3] See *Doelle* v. *Mountain States Telephone & Telegraph*, 872 F.2d 942, 944-946 (10th Cir. 1989) (federal rules allow a counterclaim for condemnation in trespass action in federal court even if the counterclaim would be barred under state procedures); *TPO Incorporated* v. *FDIC*, 487 F.2d 131, 133-134 (3d Cir. 1973) (although special state proceeding restricted filing of counterclaims, that restriction is inapplicable in federal court); *Tolson* v. *Hodge*, 411 F.2d 123, 127-129 (4th Cir. 1969) (administrator of the estate of a deceased nonresident driver can assert a counterclaim under the federal rules notwithstanding state rules that deny him the capacity to sue in state proceeding).

Petitioner claims that the decision of the Texas Supreme Court in *Barr* v. *RTC*, 837 S.W.2d 627 (1992), has overruled the decision on which the lower courts relied, *Kaspar* v. *Keller*, 466 S.W.2d 326 (Tex. Civ. App. Waco 1971) (writ ref'd n.r.e.). At the threshold, there exists no basis for supposing that the lower courts' evaluation of Texas law presents any question worthy of review by this Court. Compare *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976). In any event, nothing in *Barr* suggests that the Texas Supreme Court intended to reject the rule adopted in *Kaspar* and subsequent cases that followed *Kaspar*.[4] *Barr* does not mention *Kaspar* itself and does not address the situation presented in *Kaspar*. Rather, *Barr* involves a case in which a lender brought two lawsuits to collect on a loan. The Texas Supreme Court held that a judgment in favor of the borrower in one of the suits was res judicata as to claims against the borrower in the second suit arising out of the same transaction. 837 S.W.2d at 631. That analysis would have no application here, because respondent has brought a claim for collection only once, in this action.

To be sure, the court in *Barr* did suggest that its "transactional" approach to res judicata resembled the compulsory counterclaim rule, 837 S.W.2d at 630, but the case did not involve, and the court did not address, the possibility that application of the com-

[4] See *Stille* v. *Colborn*, 740 S.W.2d 42, 44 (Tex. Ct. App. San Antonio 1987) (writ denied); *Thurman* v. *FDIC*, 889 F.2d 1441, 1444-1445 (5th Cir. 1989); *Phillips* v. *FDIC* (*In re Phillips*), 124 B.R. 712, 717-718 (Bankr. W.D. Tex. 1991); see also *Belote* v. *McLaughlin*, 673 S.W.2d 27, 30 (Mo. 1984) (following *Kaspar* to adopt same rule under Missouri law).

pulsory counterclaim rule would modify the substantive right of a lender to elect between judicial and nonjudicial foreclosure. Petitioners' argument—that the Texas Supreme Court's adoption of a res judicata rule that parallels the compulsory counterclaim rule implicitly invalidates an exception to the compulsory counterclaim rule—is insufficient to justify review by this Court of the lower courts' interpretation of Texas law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ADDENDUM

1. The second sentence of the second paragraph on Pet. App. 7a should read as follows:

> DDI and Douglas contend that FDIC/corp. cannot collect on the notes because First RepublicBank Abilene, N.A. (FRBA), a prior holder of the notes, lost its right to collect on the *notes by failing to counterclaim to collect on the* overdue notes in prior litigation.

2. The second sentence of the paragraph carrying over from Pet. App. 8a to Pet. App. 9a should read as follows:

> Fed.R.Civ.P. 13(a) provides that a counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the plaintiff's *claim. Under rule 13(a), FRBA's debt* collection claims against DDI and Douglas might very well constitute compulsory counterclaims.

3. The penultimate sentence of the first full paragraph on Pet. App. 15a should read as follows:

> Neither have they controverted the *amounts due on the notes, the interest rate to be applied, or the* amount of attorneys' fees requested by FDIC.